

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL RAMOS,

Petitioner,

No. C 05-5181 PJH (PR)

v.

A. P. KANE, Warden,

Respondent.

**ORDER GRANTING MOTION
TO DISMISS IN PART;
SCHEDULING ORDER**

This is a habeas case filed pro se by a state prisoner. The petition attacks the parole board's denial of parole for the eighth time. As grounds for federal habeas relief petitioner alleges that his due process rights were violated by the board's basing its decision on the unchanging and unchangeable circumstances of the crime; that the decision breached his plea bargain, violating due process; that the "some evidence" standard should not be the standard for constitutionally-sufficient evidence to support denial of parole; and that there was not some evidence to support the decision.

Respondent has moved to dismiss, contending that (1) the California Supreme Court's decision in *In re Dannenberg*, 34 Cal. 4th 1061 (2005), establishes that California prisoners have no liberty interest in parole and that prisoners therefore have no federal due process rights in connection with parole decisions; (2) petitioner's "breach of plea bargain" claim is not exhausted, making this a mixed petition which must be dismissed; and (3) as to the plea bargain claim, petitioner has not pleaded the facts of his claim, so has failed to adequately allege a basis for federal habeas relief.

1. *Dannenberg claim*

Petitioner's contention that the California Supreme Court's decision in *Dannenberg*

1 establishes that prisoners do not have a liberty interest in parole has now been rejected by
2 the Ninth Circuit. See *Sass v. California Bd. of Prison Terms*, 2006 WL 2506393 at *3 (9th
3 Cir. Aug. 31, 2006). Respondent's contention that the petition should be dismissed for this
4 reason is without merit.

5 2. *Failure to allege basis for federal habeas relief as to plea bargain claim*

6 An application for a federal writ of habeas corpus filed by a prisoner who is in state
7 custody pursuant to a judgment of a state court must "specify all the grounds for relief
8 which are available to the petitioner ... and shall set forth in summary form the facts
9 supporting each of the grounds thus specified." Rule 2(c) of the Rules Governing § 2254
10 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not sufficient, for the petition is
11 expected to state facts that point to a 'real possibility of constitutional error.'" Rule 4
12 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970).
13 "Habeas petitions which appear on their face to be legally insufficient are subject to
14 summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108
15 (9th Cir. 1996) (Schroeder, J., concurring).

16 Petitioner alleges only one claim in the form petition, that he "was deprived of a
17 liberty interest by the unreasonable application of regulations and statutes." In the section
18 which calls for supporting facts for this claim, however, he presents several legal
19 allegations which, because petitioner is pro se, the court has treated as separate issues. In
20 the facts section, which is about one typewritten page long, he mentions the plea bargain
21 twice: "Although petitioner has been eligible since July 10, 1996, and petitioner was
22 convicted by plea agreement, the Board has continued to rely on the circumstances of the
23 offense to deny parole," and "[p]etitioner also contends that because the state agreed the
24 offense was no more than second-degree murder the plea agreement heightened his
25 expectation of receiving a term consistent with the matrix terms but has been violated."

26 Respondent concedes in his reply that petitioner has adequately explained this
27 claim in his opposition to the motion to dismiss, but correctly contends that the explanation
28

must be in the petition, not in an opposition. See *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (new claims may not be raised in traverse; they should be presented in an amended petition, in response to which the state can file an answer). The explanation in the opposition is: "Petitioner presented the claim to the California Supreme Court that the constitutional effect was to deprive such prisoners of the reasonable expectation that they would serve a term consistent with those provided by the matrix for second degree murder, not a more serious offense." This is close to the second of petitioner's references to the plea bargain quoted on the preceding page. The facts alleged in the petition were sufficient to raise the plea bargain claim. This ground for dismissal is without merit.

3. *Mixed petition*

Respondent contends that petitioner did not exhaust his claim that the board violated his due process rights by violating his plea agreement. Because the other issues are exhausted, that would make this a mixed petition.

An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court may not be granted unless the prisoner has first exhausted state judicial remedies, either by way of a direct appeal or in collateral proceedings, by presenting the highest state court available¹ with a fair opportunity to rule on the merits of each and every issue he or she seeks to raise in federal court. See 28 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Petitioner has the burden of pleading exhaustion in his habeas petition. See *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981).

The United States Supreme Court held in *Rose v. Lundy*, 455 U.S. 509 (1982), that federal courts must dismiss a habeas petition which contains one or more unexhausted

¹ In California, the supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction. *Nino v. Galaza*, 183 F.3d 1003, 1006 n.2 (9th Cir. 1999). Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeals. *Id.* If the court of appeals denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may instead file an original habeas petition in the supreme court. *Id.* at 1006 n.3.

1 claims. *Id.* at 522 (1982). If the petition combines exhausted and unexhausted claims,
2 *Rose v. Lundy* requires dismissal of the entire habeas petition without reaching the merits
3 of any of its claims. *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). However, the rule
4 is not as absolute as might first appear. *Rose* itself provides that the dismissal must be
5 with leave to amend to delete the unexhausted claims; if they are deleted, the court can
6 then consider those which remain. See *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir.
7 2000). And there are two other exceptions: One is that when the petition fails to raise even
8 a colorable federal claim, it may be denied even if it is partly or entirely unexhausted, 28
9 U.S.C. § 2254(b)(2), and the other is that rather than dismiss, the court may stay a mixed
10 petition to allow the petitioner to return to state court to exhaust the unexhausted issue or
11 issues, *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

12 Petitioner's state habeas petition was denied in the California Court of Appeal.
13 Petitioner then petitioned for review in the California Supreme Court. Respondent
14 contends that the petition for review was insufficient to fairly present his claim that his plea
15 agreement was breached.

16 For purposes of exhaustion, pro se petitions in state court may, and sometimes
17 should, be read differently from counseled petitions. *Peterson v. Lampert*, 319 F.3d 1153,
18 1159 (9th Cir. 2003) (en banc). "When a document has been written by counsel, a court
19 should be able to attach ordinary legal significance to the words used in that document."
20 *Id.* at 1158. When it has been written by a pro se petitioner, a court may need to be more
21 flexible. See, e.g., *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003) (petitioner's pro se
22 status in state court was a factor in favor of finding exhaustion where prisoner claimed
23 ineffective assistance of counsel but failed to cite federal constitution or federal case law in
24 support of his claim). Neither confused arguments nor poor lawyering will necessarily
25 defeat a pro se petitioner's otherwise-adequate efforts to assert a federal claim in state
26 court. *Sandgathe v. Maass*, 314 F.3d 371, 378 (9th Cir. 2002) (holding that citation of
27 inapposite federal cases did not change the fact that the petitioner raised the pertinent
28

1 argument on appeal; argument was deemed "fairly presented" because state courts
2 expressly addressed federal claim, directly or by implied adoption of lower court ruling,
3 even though the petitioner did not expressly assert federal grounds for the claim).

4 The exhaustion requirement is satisfied only if the federal claim has been "fairly
5 presented" to the state courts. *Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1996). A claim is
6 "fairly presented" only if the petitioner either referenced specific provisions of the federal
7 constitution or federal statutes, or cited to federal or state case law analyzing the federal
8 issue. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). The specific
9 factual basis of the federal claim also must be presented to the highest state court. *Kelly v.*
10 *Small*, 315 F.3d 1063, 1067-69 (9th Cir. 2003) (finding unexhausted ineffective assistance
11 of counsel and prosecutorial misconduct claims where specific instances of ineffectiveness
12 and misconduct asserted in federal petition were neither in the California Supreme Court
13 petition nor discussed by the court of appeal).

14 Petitioner's petition for review to the California Supreme Court is attached to his
15 habeas petition as exhibit one. In its table of contents he lists two "[a]rguments,"
16 summarized in brief propositions, neither of which mentions the plea bargain. On page one
17 is a list of "Questions Presented." One of these contains a brief reference to the plea
18 bargain: "Does the Board of Prison Terms ("the Board") abuse its discretion by applying its
19 regulations in a manner that is inconsistent with statutory provisions and does it
20 unconstitutionally deprive prisoners like petitioner of a vested liberty interest and plea
21 agreement benefit?" On the next page, in a series of questions purporting to show the
22 necessity for review, the plea agreement is briefly mentioned again: "May the Board or
23 Governor's personal opinion and standardless assessment of the gravity of the offense
24 disregard a jury's determination or plea agreement?" And finally, on page twenty-four: "The
25 Board's identical, and arbitrary, use of the regulation is inconsistent with statutory language
26 and unlawfully deprives prisoners like petitioner of a vested liberty interest, particularly in
27 cases like here where petitioner was convicted by a plea agreement." Respondent asserts
28

1 that these are the only three references to the plea agreement in the petition for review;
2 petitioner does not dispute the claim and the court's review of the document has turned up
3 no others.

4 In the petition for review petitioner does not state as a separate issue his contention
5 that the state breached the plea bargain agreement by not granting him parole, nor does he
6 discuss it in those terms – the word “breach” does not appear. He does not cite *Santobello*
7 *v. New York*, 404 U.S. 257 (1971), the landmark case which held that it is a violation of due
8 process for the state to not carry out its part of a plea agreement. See *id.* at 262. But the
9 main reason the court concludes that this claim was not exhausted is that petitioner did not
10 allege what he has here, that at as result of the plea bargain he had a right to be allowed
11 parole according to the Board's matrix for second degree murder and not as if he had pled
12 guilty to an even more serious crime. He did not tell the state court what the plea bargain
13 was and did not say what part of it was breached. This omission is sufficient in itself to
14 compel the conclusion that the issue is not exhausted, see *Kelly*, 315 F.3d at 1067-69 (9th
15 Cir. 2003) (fair presentation requires that the specific factual basis of the federal claim be
16 presented to the highest state court), and petitioner's failure to separately state and argue
17 his claim merely makes that failure even clearer. Respondent's motion to dismiss will be
18 granted on this ground.

19 CONCLUSION

20 1. Respondent's motion to dismiss (document number 3 on the docket) is
21 **GRANTED.**

22 2. Petitioner may choose from three possible courses of action: (1) he may
23 dismiss this petition with an eye to exhausting and then filing another federal petition;² (2)
24 he may amend the petition to dismiss the unexhausted issue, and proceed with those
25

27 ² This option is more apparent than real, because any subsequent federal petition
28 would almost certainly be barred by the statute of limitations.

1 which are exhausted;³ or (3) he may ask for a stay of this case while he returns to state
2 court to attempt to exhaust the plea bargain issue, then, if unsuccessful in state court,
3 return here and ask that the stay be lifted. If he chooses the third option, asking for a stay,
4 he must show "good cause" for his failure to exhaust sooner, that the issue is "potentially
5 meritorious," and that he has not engaged in "dilatory litigation tactics." See *Rhines v.*
6 *Weber*, 544 U.S. 269, 277 (2005).

7 3. Petitioner must elect one of the three choices set out in section three within
8 thirty days of the date this order is entered. If he does not, this case will be dismissed.

9
10 **IT IS SO ORDERED.**

11
12 Dated: February 23, 2007.



13 _____
14 PHYLLIS J. HAMILTON
15 United States District Judge
16
17
18
19
20
21
22
23

24 G:\PRO-SE\PJH\HC.05\RAMOS181.MDSMSS
25
26 _____

27 ³ If he chooses this option he probably will not be able to file a future federal petition
28 containing the plea bargain issue, because second federal petitions are generally barred by
28 U.S.C. § 2244(b)(2).